tration lists exclusively, leads to the selection of grand juries that do not represent a fair cross section of the community, because certain groups such as the young, the poor, blacks, the poorly educated, and the unskilled do not register to vote in such great numbers as other groups. Thus, defendants maintain that the voter registration lists of the various counties must be supplemented by other lists, such as unemployment rosters or welfare roles.

Another way in which defendants claim the Southern District Plan fails to produce a cross section is by its provision that the master jury wheel be completely emptied and refilled only once every four years. Defendants point out that if the youngest persons on the grand jury wheel are twenty-one when the wheel is first made up from the voter registration lists (these persons having just become eligible to register to vote), these same youngest persons will have almost reached the age of twenty-four before the grand jury wheel is refilled again. Thus, juries constituted towards the end of the four-year period will have no persons of the ages of twenty-one to almost twenty-four on them.

Defendants' third contention relating to the policy of 28 U.S.C. § 1861 is that the requirement that jurors be twenty-one years of age excludes eighteen to twenty year olds in contravention of the cross section requirement. The identical minimum age requirement found in 28 U.S.C. § 1865(b) (1) is interpreted by defendants not to be an absolute requirement, but to indicate merely that the minimum age for jury service is tied to the minimum age for voting. Since the minimum voting age is now eighteen, the minimum age for jury duty must also be set at eighteen.

Before addressing each of the specific claims of defendants it must be made clear that, "While the cross-sectional concept is firmly imbedded in the law, the constitution does not require that the jury or jury venire be a statistical mirror of the community [citations omitted]." United States v. Di Tommaso, 405 F.2d 385, 389 (4th Cir. 1968). See also H.R. # 1076, 1968 U.S.Code Cong. & Adm.News, Vol. 2, pp. 1792, 1794. Not all groups need be represented on the grand jury wheel, nor must the cognizable groups be represented in the same proportions as their proportions in the community.

To prevail on their contentions, defendants must show: first, that the groups in question were cognizable for purposes of defining a fair cross section of the community; and, second, assuming without deciding that it is enough to show that a cognizable group was severely underrepresented, as opposed to systematically excluded, that the groups in issue here were, in fact, underrepresented on the grand jury wheel and in the jury venire.[4]

Turning now to defendants' first claim, defendants have made no showing that indicates that unsupplemented voter registration lists cannot yield a cross section of the community in the Southern District of New York. The Southern District Plan contains an explicit finding by the judges of this Court that,

> "The persons whose names appear on the voter registration lists of the aforesaid eleven counties

[4] Defendants Irving Kahn and Teleprompter Corporation are not members of any of the groups claimed to be excluded or underrepresented here. However, we agree with defendants' contention that one need not be a member of the underrepresented group to challenge a grand jury on cross sectional grounds. Thiel v. Southern Pacific Co., 328 U.S. 217, 223, 66 S.Ct. 984, 90 L.Ed. 1181 (1946).

[comprising the Southern District] used for the last Federal or State general election represent a fair cross section of the community in the District." Art. III. (A).

Mere conclusory allegations and nationwide statistics regarding the propensity of the young, the poor, blacks, the poorly educated, and the unskilled to register to vote have limited relevance for a challenge to a plan in a particular geographic district. Lower registration of such groups in the South or West may skew nationwide figures so as to make them inapplicable to this District. If defendants' statistics are given weight here, then these very same figures might be used to overthrow juror selction plans relying on voter registration lists, or actual voter lists, anywhere in the country. Had Congress felt that voter lists were inadequate to produce a cross section anywhere in the United States, it would not have selected them as the primary source for jury lists. See 28 U.S.C. § 1863(b) (2), *infra*.[5] Moreover, the case law has consistently held that the exclusion of nonvoters from juries does not impair the cross sectional aspect of such juries. Camp v. United States, 413 F.2d 419, 421 (5th Cir. 1969) and cases cited therein; United States v. Butera, 420 F.2d 564, 573 (1st Cir. 1970) and cases cited therein at n. 21.

Defendants' second contention relates to the provision in the Southern District Plan for completely emptying and refilling the master jury wheel every four years. Defendants maintain that this is in contravention of the def-

[5] See H.R. #1076, *supra*, at p. 1794:

"The bill [the Jury Selection and Service Act of 1968], as amended, provides that sources of names other than voter lists may be used to supplement, but not to supplant, voter lists."

initional section of the Jury Selection and Service Act which provides, in § 1869 (c), that: "'voter registration lists' shall mean the official records maintained by State or local officials on persons registered to vote in either the *most recent* State or the *most recent* Federal general election. . . ." (Emphasis added).[6] Defendants read this provision to mean that the master jury wheel must be refilled at least every two years. They rely for this interpretation on a statement in the House Report on the Jury Selection and Service Act which reads: ". . . while the two subsections permit the plan to choose between State and Federal lists, they also insure that the list used will in any event not be more than 2 years old." H.R. # 1076, *supra*, at pp. 1806-07. However, § 1869(c), as well as the above commentary, can be read to mean that at any time the master jury wheel is to be completely refilled, the most recent voter registeration, or actual voter lists must be used. Such an interpretation is supported by 28 U.S.C. § 1863 (b) (4) which states that, "The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times." See also H.R. # 1076, *supra*, at p. 1800. Surely if Congress had meant to require refilling every two years it would have explicitly so stated.

A four-year period was selected by the Judicial Conference of the United States, by a Special Resolution, and subsequently adopted by the Southern District, because it was thought that there would be a significant change in the registration rolls only at the time of presidential elections. Such a determination carries presumptive

[6] This definition is substantially the same as the definition of the term in the Southern District Plan. See Art. I.(4).

validity.[7] See Thiel v. Southern Pacific Co., 328 U.S. at 220, 66 S.Ct. 984.

The simple answer to defendants' third contention is that if Congress wishes to set the minimum age for jury service at eighteen, rather than at twenty-one, to make the minimum age for jury service and for voting identical, it may do so. In the meanwhile, the Jury Selection and Service Act of 1968 is clear on its face as setting the minimum age at twenty-one.

Defendants cannot have it both ways. They cannot argue here that Congress believed the requirements for voting to be so intimately connected with those for jury service that it set the same minimum age for both, and argue, in support of their first contention, that Congress thought so little of the similarity of qualifications for voting and for jury service that it provided, by 28 U.S.C. § 1863(b) (2), *supra*, for large numbers of nonvoters to serve on juries.

Moreover, it must be noted that the grand jury which indicted defendants was empaneled on July 28, 1970. The Voting Rights Act amendments of 1970 which enfranchised 18 year olds, had not withstood constitutional challenge until December 21, 1970. Oregon v. Michell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272. The Twenty-Sixth Amendment to the Constitution which likewise permitted 18 year olds to vote was not passed and submitted to the States for ratification until March 23, 1971.

Title 28 U.S.C. § 1867 provides the exclusive procedure for challenging a jury on the grounds that it was not chosen

[7] See letter of Judge Irving Kaufman of the U. S. Court of Appeals, Second Circuit, dated January 20, 1970.

in compliance with the Jury Selection and Service Act of 1968. 28 U.S.C. § 1867 (e). The section provides that:

> In criminal cases . . . the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury. 28 U.S.C. § 1867(a).

Subsection (d) provides that:

> Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commission or clerk, or any other relevant evidence. . . .

Defendants here have not met the requirement of subsection (d) regarding a sworn statement of facts. They have proffered nothing but conclusory allegations and nonspecific national statistics in support of their grand jury challenge. Nor would the discovery of the data defendants seek materially aid their case.

As to some groups, defendants have failed to show that they are cognizable groups for purposes of a cross sectionally valid jury. They have submitted affidavits that are intended to prove that the views of eighteen to twenty-one year olds are significantly different from those of other age groups in the population. Assuming the truth of this allegation for purposes of deciding this motion, defendants have nonetheless failed to show that the attitudes of this

group are inadequately represented by those several years older than they, that is, that eighteen to twenty-one year olds are a distinct, cognizable group. See United States v. Di Tommaso, *supra*, 405 F.2d at 391, citing King v. United States, 346 F.2d 123 (1st Cir. 1965). As to the group of blacks, which is presumptively cognizable because it is a racial group, they have not indicated the actual proportion of this group in the population of the Southern District. Defendants have not defined a specific statistical community in terms of which the racial cross section can be measured.

Though the age group of twenty-one through twenty-five may be a cognizable group for purposes of a cross section, defendants have not shown that this group is statistically severely underrepresented on Southern District voter registration lists.

Defendants also maintain that the poor, the poorly educated, and the unskilled, either as a single group, or as three distinct groups, are underrepresented. They have made no showing statistically, merely asking the court to take judicial notice of the fact that such groups tend to register to vote less, and are thus underrepresented on voter registration lists.

B.

The second branch of defendants' motion is a constitutional challenge to the jury selection procedure employed here, grounded on the due process clause of the Fifth Amendment, as it makes applicable to the federal government the equal protection clause of the Fourteenth Amendment, and on the Sixth Amendment.

Defendants consistently confuse the issue of the personal right to serve on a grand jury with the issue of the right to have a particular group represented on one's grand jury. The first issue, which pertains to the right of equal protection, is not before the court in this case. Nor can defendants claim that they have been denied a jury of their peers, since defendants are not members of any of the allegedly underrepresented groups.

It is important to note that defendants seem to mistake the standard to be applied for determining whether there is a cross section.

> "It is true that *Rabinowitz* [v. United States, 366 F.2d 34 (5th Cir. 1966)] stated that 'if a fair cross section is consistently lacking, then, without more, it is established that the commissioners have failed in their duty.' 366 F.2d, at 58. But the issue which then emerges is what constitutes a 'fair cross-section.' The district court in the instant case took the position that, absent intentional exclusion, representation of the various relevant elements in the community was enough. We agree. Under the authorities we have cited, we reject defendants' apparent argument that approximately proportional representation of the various identifiable groups in the community is required. If it can be obtained by random selection, proportional representation may be the ideal—because it is the ultimate opposite to intentional exclusion—but it can be achieved only rarely, and then only in regard to some but not all, of relevant criteria. Substantial representation is all that is required." United States v. Di Tommaso, 405 F.2d 385, 390 (4th Cir. 1968). See also, United States v. Butera, 420 F.2d 564, 567 (1st Cir. 1970); United States v. McVean, 436 F.2d 1120, 1122 (5th Cir. 1971).

> "It should be remembered at the outset that, while a true cross-section is the ultimate ideal, it is by no means the Constitutional mandate. What is required is a jury selection system free of discrimination against properly cognizable groups." United States v. Butera, *supra*, 420 F.2d at 572.

As illustrated in Section I above, defendants have made no showing that they have been denied a cross section of the community in their grand jury venire, in violation of their right to equal protection.

Defendants' request for discovery of every fourth questionnaire mailed by the Clerk in November, 1969, and returned prior to May 10, 1970, and for a hearing on the questionnaire data, is denied for the reasons stated in Section A above. Defendants' motion to dismiss the indictment on the grounds that the grand jury was improperly constituted is also denied.

V. Motion for Discovery

Defendants Kahn and Teleprompter move for discovery and inspection pursuant to Rule 16, Fed.R.Crim.P.

1. The Government has consented to requests (a),[8] (b),[9] and (e).[10]

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[8] The transcripts of the testimony of defendant Irving Kahn before the grand jury.

[9] Any other relevant written or recorded statements by defendant Kahn within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for the government, including, but not limited to, typewritten or handwritten statements, reports of interviews, notes of interviews, (whether signed or unsigned) and tape or wire recordings, whether made by an attorney for the government or by any other government employee.

[10] Any relevant results or reports of scientific tests or experiments made in connection with this case, and with the investigation leading to the indictment, or copies thereof, as are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for the government, including, but not limited to, fingerprint reports, voice analysis reports and handwriting analysis reports.

2. Requests (d)[11] and (f)[12] are granted.[13] Defendant Teleprompter is entitled to the grand jury testimony of its officers, directors, agents and employees requested in (d). United States v. United Concrete Pipe Corp., 41 F.R.D. 538 (N.D. Tex. 1966). The court also grants request (f) as authorized by Rule 16(b), since it is reasonable and material. The grant, however, is only as to the prior criminal records of each person named in the indictment as a defendant or co-conspirator. Investigations made by the Government as to these persons are denied.

3. Requests (c)[14] and (g)[15] are denied. The Government is ordered to permit defendants Kahn and Teleprompter to inspect and copy transcripts of the grand jury testimony of any persons listed in request (c) who were employees, officers, agents, directors or attorneys of Teleprompter at the time they so testified. In all other respects request (c) is denied. The court is advised that defendants Tompkins, Deardorff and McKee may testify for the Government at trial. Their statements requested in

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[11] The transcripts of the testimony of any other officers, attorneys, agents, directors, or employees of defendant Teleprompter Corporation or its Johnstown subsidiary, Johnstown Cable T.V. before the grand jury.

[12] Any and all reports in the custody or possession of the government which set forth the prior criminal records or investigations with respect to each person named in the indictment as a defendant or co-conspirator.

[13] They are granted only to the extent noted in the opinion, of course.

[14] The transcripts of the testimony of Eugene Weinrich, Caywood Cooley, Walter Kinash, Samuel R. Di Francesco, Jr. and Walter Schier before the grand jury.

[15] Any and all written or recorded statements or confessions made by any of the other persons in the indictment named as defendants or as co-conspirators.

(f) are therefore statements by prospective Government witnesses, specifically exempt from discovery under Rule 16(b).

VI. Motion for a Bill of Particulars

Defendants Kahn and Teleprompter have moved for a bill of particulars.

1. The Government has consented to request number 1.[16]

2. Requests number 2 [17] and 5 [18] are granted.

3. Requests number 3,[19] 4,[20] and 6[21] are denied. These requests are inquiries into the legal theory of the Government's case, and hence not a proper aspect of a bill of particulars. See United States v. Schillaci, 166 F. Supp. 303, 307 (S.D.N.Y. 1958).

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[16] With respect to paragraph "1" of Count One of the indictment the names of the "other persons whose names are to the grand jury known" who the government will contend conspired with defendants to commit offenses in violation of 18 U.S.C. § 1952 and the names of such alleged co-conspirators who were unknown to the grand jury, but who have since become known to the government.

[17] With respect to paragraph "2" of Count One of the indictment, whether the government will contend that the "unlawful activity" referred to therein was bribery in violation of Title 18 §§ 4303 and 4304 of the Penal Code of the State of Pennsylvania and, if not, which Pennsylvania statutes were allegedly violated.

[18] With respect to Count Two of the indictment, the acts which constitute the alleged criminal activity, specifying the time and location of the acts.

[19] With respect to the entire indictment, whether the government will contend that the bribery alleged therein was part of an unlawful course of interstate racketeering.

[20] With respect to the entire indictment, whether the government will contend that any of the defendants were racketeers and, if so, the identity of such defendants.

[21] With respect to the entire indictment, on what legal basis the government contends that Teleprompter has committed a crime.

APPENDIX D

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of January one thousand nine hundred and seventy-three.

Present:

HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges,

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

J. HOWARD DEARDORFF, IRVING KAHN, ROBERT MCKEE, KENNETH TOMPKINS, TELEPROMPTER CORPORATION,
Defendants,

IRVING KAHN AND TELEPROMPTER CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX E

Relevant Statutes

Federal

Title 18 U.S.C. § 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, ch. 645, 62 Stat. 701.) Title 18 U.S.C. § 371, pp. 4190-91.

Title 18 U.S.C. § 1952. INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. (Added Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212; Pub. L. 91-513, title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.) Title 18 U.S.C. § 1952, p. 4346.

Pennsylvania

Pa. Stat. Ann. tit. 18, § 4303. BRIBERY OF GOVERNMENTAL OFFICERS AND EMPLOYES; JUDGES, JURORS, ETC.

Whoever shall directly or indirectly, or by means of and through any artful and dishonest device whatever, give or make any promise, contract or agreement, for the payment, delivery, or alienation of any money, goods or other thing, in order to obtain or influence the vote, opinion, verdict, award, judgment, decree, or behavior of any member of the General Assembly, or any officer or employe of this Commonwealth, or of any political subdivision thereof, or any judge, juror, justice, referee or arbitrator, in any bill, action, suit, complaint, indictment, controversy, matter or thing whatsoever, depending or which shall depend before him or them, is guilty of bribery, a misdemeanor, and on conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or to undergo imprisonment by separate or solitary confinement at labor not exceeding one (1) year, or both.

The member of assembly, or officer, or employe of the Commonwealth or of any political subdivision thereof, or any judge, juror, justice, referee, or arbitrator, who shall accept or receive, or agree to accept or receive such bribe, is guilty of receiving a bribe, a felony, and on conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars ($1,000), or to undergo imprisonment by separate or solitary confinement at labor not exceeding five (5) years, or both. As amended 1963, July 31, P.L. 421, § 1. Pa. Stat. Ann. tit. 18, § 4303, Supp. p. 41.

Appendix E—Relevant Statutes

Pa. Stat. Ann. tit. 18, § 4304. CORRUPT SOLICITATION

Whoever, directly or indirectly, by offer or promise of money, office, appointment, employment, testimonial or other thing of value, or by threats or intimidation, endeavors to influence any member of the General Assembly, State, county, election, municipal or other public officer, in the discharge, performance, or nonperformance of any act, duty or obligation pertaining to such office, is guilty of corrupt solicitation, a misdemeanor, and on conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars ($1,000), or to undergo imprisonment not exceeding two (2) years, or both. 1939, June 24, P.L. 872, § 304. Pa. Stat. Ann. tit. 18, § 4304, p. 188.

Pa. Stat. Ann. tit. 53, § 35911. BRIBERY OF OFFICERS OR EMPLOYES; PENALTY

Any person who shall, directly or indirectly, offer, give, or promise any money or anything of value, testimonial, privilege, or personal advantage to any member of council or other city officer or employe, to influence him in the performance or nonperformance of any of his public or official duties, shall be guilty of bribery, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding ten thousand dollars, and to undergo imprisonment for a period not exceeding five years, and shall be forever incapable of holding any place of profit or trust in this Commonwealth. Title 53 Pa. Stat. Ann. § 35911, p. 85. 1931, June 23, P.L. 932, art. IX, § 911; 1951, June 28, P.L. 662, § 9. Pa. Stat. Ann. tit. 53, § 35911, p. 85.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1191

IRVING B. KAHN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-1193

TELEPROMPTER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners contend that the grand jury was improperly constituted and that the Travel Act, 18 U.S.C. 1952, was improperly applied. Petitioner Kahn in addition raises issues concerning the applicability and interpretation of the perjury statutes, 18 U.S.C. 1621 and 1623. Petitioner Teleprompter Corporation further contends that Kahn's perjurious statement before the grand jury should not have been admitted in evidence against it.

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on five counts of conspiracy and bribery in vio-

lation of the Travel Act, 18 U.S.C. 1952. Petitioner Kahn was also convicted of perjury, in violation of 18 U.S.C. 1621. Kahn was sentenced to concurrent terms of 5 years imprisonment and Teleprompter was fined a total of $10,000. The court of appeals affirmed in a lengthy opinion (Pet. App. A).

The facts are set forth in the opinion below (Pet. App. 2a-6a).[1] They show in essence that in 1966, Kahn, the founder, president, and chairman of the board of Teleprompter, acting on its behalf, gave a $15,000 bribe to three Johnstown, Pennsylvania city officials (the mayor and two city councilmen) to insure Teleprompter's retention of a local cable television franchise. Trips between New York and Pennsylvania, as well as the use of interstate telephone facilities, were shown to have been part of the scheme.

Later, before a federal grand jury, on December 17, 1970, Kahn denied that he had ever paid any money to any Johnstown officials. Upon being confronted with evidence of a payment of $7500, he claimed that the money had been paid to the mayor's son for a public opinion survey (Tr. 601-652). By December 29, 1970, the mayor and councilmen all had admitted in testimony before the grand jury that the $7500 payment, as well as two further payments, was in fact made to them as a bribe (Tr. 224-227). On January 6, 1971, Kahn told an assistant United States Attorney that in reality he had been the victim of an extortionate scheme (see petitioner Kahn's reply brief in the court of appeals, footnote at p. 32). Kahn volunteered to return to the grand jury on the condition that he be permitted to read a prepared statement without being cross-

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[1] References to "Pet. App." refer to identical portions of both petitioners' appendices.

examined by the government (see the government's brief in the court of appeals, footnote at p. 55). In that statement, which he was permitted to read to the grand jury on January 27, 1971, Kahn admitted knowing that the falsity of his prior denials of wrongdoing had already been exposed, but he claimed to have recalled facts, previously forgotten, which allegedly constituted a defense to the bribery charges.[2]

In response to petitioners' varied claims, we rely primarily on the extensive and thorough opinion of the court below; however, we make the following additional points:

1. Contrary to the claim of petitioner Kahn (Kahn Pet. 6-9) this case raises no conflict among the courts of appeals on the question whether the government has the discretion to prosecute perjury committed before a grand

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[2]Kahn's January 27, 1971, testimony before the grand jury, which was read into the record at trial, stated in part as follows (Tr. 658-661):

> Now, I have had a rather extensive search of the files made. We have looked through our old files in the warehouse and in the files of our Johnstown company as well as in the files of Teleprompter's office in New York. Also, I have spoken to present and former employees of Teleprompter and to our local attorney in Johnstown.
>
> From all of these investigations, we have discovered facts and records which I never knew of or did not recall when I testified here on December 17th.
>
> * * * * *
>
> I understand that others have testified in this matter and that I have been accused of bribing a public official in connection with the Johnstown franchise.
>
> Those who have accused me are criminals and coerced me into paying money. In short, they made it plain that they would effectively interfere with and obstruct our legitimate business in Johnstown unless they were paid money.

jury under either 18 U.S.C. 1621 or 18 U.S.C. 1623. The court below specifically stated (Pet. App. 21a) that it did not reach that question. Subsequently, in *United States* v. *Ruggiero*, 472 F. 2d 599, the Second Circuit held that the government was entitled to prosecute under 18 U.S.C. 1623 rather than 18 U.S.C. 1621 so long as, in doing so, it did not discriminate against any class of defendants. There is no conflict between *Ruggiero* and *United States* v. *Clizer*, 464 F. 2d 121 (C.A. 9), certiorari denied, 409 U.S. 1086, where the Ninth Circuit simply held that an indictment which tracked the language of 18 U.S.C. 1623 charged that offense even though it mistakenly referred to 18 U.S.C. 1621. See our memorandum in opposition to the petition for a writ of certiorari in *Clizer*.

2. As the court below noted, Kahn was not prejudiced by the government's decision to prosecute under 18 U.S.C. 1621 rather than 18 U.S.C. 1623 (Pet. App. 21a). The government's burden of proof under Section 1623 is less favorable to a defendant than the "two-witness" requirement applicable under Section 1621, and Kahn additionally obtained the benefit of consideration by the trial court of his alleged "recantation defense" under Section 1623(d) (Tr. 1179-1182).[3] Thus "Kahn got at least his due, if not more, on the evidence" (Pet. App. 21a).

Kahn, who raised his alleged recantation defense out of the presence of the jury in a motion for judgment of acquittal (Tr. 999-1008), now contends (Kahn Pet.

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[3]In a memorandum opinion denying Kahn's post-trial motions, after assuming *arguendo* that Section 1623(d) applied to Kahn and had not been waived, the trial court refused to bar his prosecution because the court found that Kahn's second statement was not a recantation and that, in any event, the falsity of his earlier testimony had already been exposed. We are lodging with the Clerk a copy of the trial court's memorandum opinion, which is reprinted at pp. 1040-1050 of the appellants' appendix in the court of appeals.

9-13) that this statutory bar to prosecution is a jury question and that the trial court was in error for failing to instruct the jury, *sua sponte*, that it could find that Kahn's perjury prosecution was barred by Section 1623(d). But since Kahn never requested jury consideration of or a jury instruction on this matter, he should not now be heard to complain that the issue was properly one for the jury. Rule 30, Fed.R.Crim.P.[4]

3. Teleprompter claims (Teleprompter Pet. 27-28) that there was insufficient proof that Kahn was acting as Teleprompter's agent on December 17, 1970 when he testified falsely before the grand jury. The court of appeals, after noting that Kahn was president, founder, chairman of the board and a major stockholder of Teleprompter at the time he testified about the company's franchise in Johnstown, properly dismissed this claim (Pet. App. 34a, n. 21). Kahn's December 17th grand jury statement shows on its face that Kahn was speaking for both himself and Teleprompter. At the outset of the grand jury hearing, Kahn identified the attorneys who had accompanied him as counsel to the corporation and stated that he had no personal counsel (Tr. 604). In response to questions, Kahn gave his home address, telephone number, occupation, explained "what Teleprompter Corporation is and what it does" (Tr. 605), and traced "the history of the operations of Teleprompter in Johnstown, Pennsylvania * * *" (Tr. 610). Kahn understood and answered all the questions as relating to both his and Teleprompter's actions (see, *e.g.*, Tr. 614, 622, 625, 627, 631, 635, 649-650). In addition, the evidence at trial showed, and Teleprompter

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[4]Since Section 1623(d) makes recantation a "bar" to prosecution, it is likely that it was correctly treated by the district court as a question of law. See Pet. App. 22a, n. 9.

conceded (Tr. 585-588), that as president of the corporation Kahn had the authority to represent and speak for the company. There is no evidence in the record that Teleprompter had withdrawn from Kahn the authority to speak for it before December 17, 1970.

4. Both Kahn and Teleprompter (Kahn Pet. 16-23; Teleprompter Pet. 7-24) contend that the courts below erred in their application of the Travel Act by interpreting Pennsylvania state law as not recognizing extortionate coercion as a complete defense to a charge of bribery. Their primary contention is that the court below failed sufficiently to investigate Pennsylvania decisional law and to analogize from New York law. They contend that the court below improperly imposed federal principles. However, what the court of appeals did was exercise its proper responsibility of determining what Pennsylvania courts were likely to do if faced with the issue. Petitioners conceded in the court below that the Pennsylvania courts had not decided whether extortion is a complete defense to a charge of bribery (Teleprompter's brief in the court of appeals, pp. 31, 32; Kahn's brief in the court of appeals, p. 52; Kahn's reply brief in the court of appeals, p. 17). Moreover, both courts below considered (Pet. App. 9a, 41a) the Pennsylvania decisions on bribery and extortion and determined that they provided no clear guidance on this issue. Futhermore, unlike the New York statute, Pennsylvania law does not provide any excuse for paying a bribe. Compare 18 Pa. Stat. 4303 and 4304, and 53 Pa. Stat 35911, with N.Y. Penal Law Section 200.05 There was thus ample basis for the holding of both courts below "that the Pennsylvania courts would not recognize proof of extortion as a complete defense to bribery charges" (Pet. App. 10a). There is no need for

this Court to review the lower courts' reading of Pennsylvania law.[5]

5. Petitioners' challenges to the jury selection plan (Teleprompter Pet. 24-27) were fully considered and properly rejected by both courts below (Pet. App. 27a-29a, 51a-62a), in accord with the decisions of other courts in similar cases *United States* v. *Blair*, 470 F. 2d 331, 333-337 (C.A. 5), certiorari denied *sub nom. Crews* v. *United States*, March 26, 1973 (No. 72-6021); *Chase* v. *United States*, 468 F. 2d 141 (C.A. 7); *United States* v. *Ross*, 468 F. 2d 1213 (C.A. 9); *United States* v. *Guzman*, 468 F. 2d 1245 (C.A. 2).[6]

For the above reasons and the grounds set forth in the opinions below, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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[5]Petitioner Kahn further contends (Kahn Pet. 13-16) that the Travel Act prohibits only "racketeering" and that he is not a racketeer. This contention was fully considered and rejected by the courts below. See Pet. App. 25a-27a, 45a-50a.

[6]Petitioners now contend that it was "fundamental error" (Teleprompter Pet. 24) for the trial court to deny their request for a hearing to present questionnaire data on the issue of grand jury composition. However, petitioners' request for discovery of the questionnaire data was properly denied by the district court (Pet. App. 51a-62a), and therefore no purpose would have been served by holding the hearing.

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MICHAEL ROBAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1193

TELEPROMPTER CORPORATION,
Petitioner,

—v—

UNITED STATES OF AMERICA,
Respondent.

REPLY MEMORANDUM OF TELEPROMPTER CORPORATION, PETITIONER

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REPLY MEMORANDUM OF TELEPROMPTER CORPORATION, PETITIONER

Teleprompter Corporation's Petition for Certiorari raises a fundamental and pervasive issue of federalism: What sources of law should a federal court look to in deciding an issue of substantive criminal law under a federal statute, such as the Travel Act, that makes it a federal crime to violate state law. The Solicitor General, in his memorandum in

opposition, seeks to trivialize this issue by implying that Teleprompter is merely seeking to have this court "review the lower courts' reading of Pennsylvania law".

As a reading of the lower courts' opinions conclusively demonstrates, neither the Court of Appeals nor the District Court applied Pennsylvania law. Indeed the lower courts acknowledged that the Pennsylvania law was "at best, vague on the question of whether extortion is a complete defense to bribery". (Pet. App. 41a) Instead of turning to Pennsylvania case law and policy to determine how the courts of that state would construe an admittedly vague law, the lower courts turned to federal "policy" and federal case law and decided what they regarded to be "preferable" from a *federal* point of view. (Pet. App. 10a) In doing so, they totally ignored the long-standing policy of Pennsylvania which required that "when a criminal statute calls for construction, it is not the construction that is supported by the greater reason that is to prevail but that one which, if reasonable, operates in favor of life and liberty". *Commonwealth* v. *Exler*, 243 Pa. 155, 162, 89 A. 968, 971 (1914). Further, they disregarded the law of New York—the other state in which the interstate transaction occurred —which the government concedes would have required the instruction on extortion sought by Teleprompter.

We do not understand the Solicitor General to dispute Teleprompter's contention that there is considerable confusion in the lower federal courts as to the appropriate hierachy of substantive criminal law to which a federal court should turn in prosecutions brought under the Travel Act and the numerous other statutes that incorporate state

criminal law. (Tel. Pet. 10-11) This case presents an ideal vehicle through which this court can provide the needed authoritative guidance on this important issue.

Dated: New York, New York
May 1, 1973

Respectfully submitted,

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